IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951

## Nos. 428 and 429

PENNSYLVANIA WATER & POWER COMPANY AND SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND, *Petitioners*,

VS.

FEDERAL POWER COMMISSION, *Respondent*, AND CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE AND PUBLIC SERVICE COMMISSION OF MARYLAND, *Intervenors*,

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *Petitioner*,

VS.

FEDERAL POWER COMMISSION, *Respondent*, AND CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE AND PUBLIC SERVICE COMMISSION OF MARYLAND, *Intervenors*,

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF OF INTERVENOR-RESPONDENT PUBLIC SERVICE COMMISSION OF MARYLAND

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Intervenor-Respondent.

Baltimore, Maryland
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### PRELIMINARY STATEMENT

Replying to the preliminary statement in the brief (p. 1) of petitioner, Pennsylvania Water and Power Company (Penn Water), the Public Service Commission of Maryland (Maryland Commission) asserts that the rate orders of the

Federal Power Commission (FPC) here involved were "premised on" and directed "continuance of" services of Penn Water as rendered consistently in the same general manner since 1931. These orders control those services and prescribe rates therefor regardless of contract, and are issued in direct pursuance of authority conferred by the Federal Power Act (16 U. S. C. Sec. 791a-825r — pamphlet copy filed by FPC). They are fully supported by the record before FPC as found by the Court below.

The decisions of the United States Court of Appeals for the Fourth Circuit (P. W. brief, p. 2), upon which the petitioners rely,* were rendered without jurisdiction and are void under the recent ruling by this Court in the case of *Far East Conference, et al, v. United States of America and Federal Maritime Board*, decided March 10, 1952, 20 L. W. 4270.

Even assuming arguendo that the Fourth Circuit had jurisdiction to annul the contracts, its Opinions (correct or incorrect on their merits) cannot have the extended effect, asserted by the petitioners, of collaterally destroying FPC rate orders fully supported by the record in this case, relating to services rendered and as they must continue to be rendered until changed in the manner required by law (Federal Power Act, Sec. 205d).

Finally, the Fourth Circuit decisions were in clear error on each of their rulings, on the merits, as to the validity of the long term power contracts which they condemned. Be-

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* *Pennsylvania Water and Power Co., et al. v. Consolidated Gas Electric Light and Power Co. of Baltimore, et al.*, 184 F. 2d 552, 186 F. 2d 934, cert. denied 340 U. S. 906 (1950), often referred to as the "Penn Water Contract Case"; and *Consolidated Gas Electric Light and Power Co. of Baltimore, et al. v. Pennsylvania Water and Power Co., et al.*, decided January 3, 1952, petitions for certiorari filed February 23, 1952, and often referred to as the "Safe Harbor Contract Case".

fore this Court considers any such brash attempt as is made by petitioners here to have the Fourth Circuit decisions (which were made without any factual record) collaterally destroy rate orders supported by careful findings, based on an extended record and many months of hearings, it should inquire into the merits of the asserted Sherman Act and Pennsylvania public utility law violations in relation to the facts established by the instant record, and in light of the controlling force of the Federal Power Act. Such inquiry will reveal clearly that the contracts, which have been on file since their inception with FPC, the Pennsylvania Commission, and the Maryland Commission, without any governmental agency (or any private party) ever finding any invalidity in them, have been unlawfully and inequitably condemned by the Fourth Circuit.

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia is officially reported in 193 F. 2d 230 (advance sheets), and appears in the Record herein Vol. 18, p. 5367, the dissenting Opinion of Miller, J., appearing in Vol. 18, p. 5402.

The FPC Opinions and Orders affirmed by the Court of Appeals appear in the Record as follows: (1) Opinion No. 173 and Order of January 5, 1949 — Vol. 16, pp. 4845-4997; (2) Opinion No. 173A and Order of February 28, 1949, denying Petition for Rehearing on Opinion No. 173 and Order of January 5, 1949 — R. Vol. 16, pp. 5178-5194; (3) Order of March 17, 1949, denying Petition for Rehearing on Opinion No. 173A and Order of February 28, 1949 — R. Vol. 16, p. 5220; (4) Order of October 27, 1949, prescribing rate schedules — R. Vol. 17, pp. 5276-5292 and (5) Order of December 15, 1949, denying application for rehearing on Order of October 27, 1949 — R. Vol. 17, pp. 5315-5320.

## JURISDICTION

Petitioners invoke the jurisdiction of this Court under U. S. C., Title 28, Section 1254 (1) and under U. S. C., Title 16, Section 825 (1). Petition for writ of certiorari was granted February 4, 1952.

## COUNTER STATEMENT OF THE CASE

The Maryland Commission does not accept the Statement of the Case as made by either petitioner, because petitioners (1) misstate the only issue of substance which their petitions raise, in a patent effort to divert the attention of this Court from the fundamentally administrative-procedure determination of the Opinion below, and (2) make many misstatements of fact unsupported by this Record (or any other record) in order to support the factually unsupportable decisions of the Fourth Circuit.

By a studied use and frequent repetition of carefully chosen adjectives and other characterizations, petitioners' briefs seek to paint a picture in support of the Fourth Circuit decisions which has no supporting evidence. For a more detailed refutation of petitioners' unsupported charges beyond what appears hereinafter, we refer the Court to affidavits in the Record in Cases Nos. 611 and 612, current term (pp. 115, 123) and to the "Statement" and "Counter-Statement of Facts" in the brief of Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated), Intervenor-Respondent, which we hereby adopt.

It is incredible to our Commission that groundless charges, so glibly made by petitioners, could have been so extensively accepted and repeated by the Fourth Circuit (without record support) when we consider the following: (1) ever since their inception, the contracts have been on file with the Pennsylvania Commission, the Maryland Com-

mission, and FPC, and were necessarily reviewed from time to time by each Commission as related to proceedings before it (the Pennsylvania Commission originally issued, and later amended, certificates of convenience and necessity to serve under the contracts); (2) after four years of extended investigation FPC found no vice in the contracts, but on the contrary approved all of the service arrangements contained therein, and (3) the Department of Justice, charged with administering the anti-trust laws, urged denial of certiorari by this Court in the *Safe Harbor rate case*,* thus giving its stamp of approval to FPC's Safe Harbor rate order, which preserved the Safe Harbor contract as a tariff with only the rates changed.

*The Case Below.*

The proceedings below were statutory appeals from final orders in an extensive rate investigation of Penn Water's wholesale charges, for hydroelectric power and energy sold by it to Consolidated. These orders hold, in effect, that Consolidated is entitled on a 1946 basis to an annual rate reduction of approximately $1,700,000 on its power bill from Penn Water. The total annual rate reduction ordered by FPC in Penn Water's rates, on a 1946 basis, amounts to approximately $2,000,000 (FPC Opinion No. 173 and Order of January 5, 1949, R. Vol. 16, p. 4845), the remaining $300,000 of the rate reduction being allocated to Penn Water's Pennsylvania customers. This reduction was ordered to be carried out by rate schedules specified for Penn Water in the Order of October 27, 1949, which rejected schedules filed by Penn Water because they were not in compliance

* *Safe Harbor Water Power Corp. v. Federal Power Commission*, 179 F. 2d 179, cert. denied 339 U. S. 957 (1950), in which the U. S. Court of Appeals for the Third Circuit described the Safe Harbor contract as "exemplary".

with Opinion 173 and Order of Jan. 5, 1949, a petition for rehearing being denied by the Order of December 15, 1949 (R. Vol. 17, pp. 5267 and 5315, respectively).

The Opinion and Judgment below affirm in normal manner these FPC rate orders, which were based upon and fully supported by an extended record of hearings held during a long period of time. They also deny motions to annul or set aside these FPC orders, which motions were filed by petitioners at the eleventh hour and were predicated upon a decision by the Court of Appeals for the Fourth Circuit, rendered shortly in advance of oral argument below and purporting to annul Penn Water's long term power contract to supply power to Consolidated.* The Opinion below (in partial response to these motions to annul) pointed out that rate and service arrangements ordered by FPC might be valid even though they preserved service which, as resting solely on contract between the parties, might be unlawful (R. Vol. 18, p. 5372 n. 12). However, the Court based its result squarely upon the procedural determination that no change in service or rates (whether otherwise lawful or unlawful) could be properly sought by Penn Water without first petitioning FPC for such change in the manner required by law (R. Vol. 18, pp. 5375-5376).

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* *Pennsylvania Water & Power Co., et al. v. Consolidated Gas Electric Light and Power Company, et al.*, 184 F. 2d 552, 186 F. 2d 934, cert. den. 340 U. S. 906 (1950), (the *Penn Water Contract Case*). Although the motions to annul rested on this decision alone, petitioners, in motion for reargument (and now in argument here) rest in part upon the Fourth Circuit's Opinion which purportedly also annulled the power contract between Penn Water, Safe Harbor, and Consolidated, *Consolidated Gas Electric Light and Power Company, et al. v. Pennsylvania Water & Power Co., et al.*, Jan. 3, 1952 (pamphlet copy filed herein by petitioners) currently before this Court on petitions for certiorari in Nos. 611 and 612 (the *Safe Harbor Contract Case*).

*Historical Background of the Case.*

The rate case before FPC was begun by order issued September 1, 1944, which instituted an investigation of the services, contracts, rates, and charges of Penn Water for any transmission or sale of electric energy subject to FPC jurisdiction under the Federal Power Act. A companion order issued on the same date (September 1, 1944) began a similar investigation of the rates and charges of Safe Harbor Water Power Corporation (Safe Harbor). Both orders were issued in response to the request of the Maryland Commission* (Petition of August 31, 1944 — R. Vol. 16, p. 4847), which then had pending before it a general investigation of the rates and charges of Consolidated to its Maryland consumers. The Maryland Commission found it desirable to have a prior determination by FPC of the wholesale rates paid by Consolidated for hydroelectric power and energy obtained from Penn Water and Safe Harbor, before passing upon the reasonableness of Consolidated's *retail* rates to its Maryland consumers.

The generating facilities of Penn Water, Safe Harbor, and Consolidated are coordinately operated as an integrated and interconnected electric system, the interconnection being provided primarily by an extensive network of transmission lines owned by Penn Water and its wholly owned subsidiary, Susquehanna Transmission Company of Maryland. These integrated operations, as currently performed, were begun under two long-term contracts executed in 1931, to continue until 1980. These contracts were filed with FPC in compliance with the provisions of the Federal Power Act

* Additional requests for investigation were filed by the governmental authorities of Baltimore City, Baltimore County, and other intervenors in the rate case before the Maryland Commission (R. Vol. 16, p. 4847), who as such intervenors had urged the Maryland Commission to request this FPC investigation.

(Sec. 205(c); 16 U. S. C. 824d (c)) and thus became service and rate tariffs, passing out of the realm of contract and into that of duty established by law.

Under one agreement (the "Safe Harbor Contract") entered into on June 1, 1931, and supplemented by amendments dated August 1, 1932, and November 22, 1939, Consolidated purchased two-thirds and Penn Water purchased one-third of the entire Safe Harbor hydro output, produced at Safe Harbor, Pennsylvania, until 1980. In return, Consolidated and Penn Water assured Safe Harbor of a combined annual payment, divided two-thirds and one-third between the two companies, sufficient to yield a specified annual return above operating expenses (the contract return of 7% was reduced to 5% by FPC in its Opinion 143, 5 F. P. C. Rep. 221). Under the other agreement (the "Penn Water Contract"), entered into between Consolidated and Penn Water on the same date, June 1, 1931, Consolidated purchased all the power and energy available to Penn Water from its hydroelectric and steam generating plants at Holtwood, Pennsylvania, and also Penn Water's one-third of Safe Harbor's power and energy not otherwise disposed of in performance of Penn Water's obligations to its other customers. Consolidated pays Penn Water annually a lump sum sufficient to cover all operating expenses and taxes (including Penn Water's payment to Safe Harbor), plus a specified return, reduced to 5¼% by FPC in its Orders here under appeal. These contracts constitute part of the record before FPC as Items E, F, G, H, and I (R. Vol. 15, pp. 4554-4621). The form of service and payment therefor as thus described has been prescribed by the Commission's Orders.*

* A survey of the Opinions of the Fourth Circuit in the *Penn Water* and *Safe Harbor* contract cases will show that no criticism is made of

The vast triangular power pool resulting from this coordinated arrangement for the interchange of energy and services has provided the Maryland consuming public with an economical, reliable, and necessary supply of hydro power since 1931. The overall plan has been consistently praised by all parties, including Penn Water's officers (R. Vol. 1, pp. 25-26; 68-71), until just before FPC ordered Penn Water to reduce its rates. Then, and only then, did Penn Water allege that the 1931 contracts were invalid. In its latest opinion (pamphlet copy in *Safe Harbor Contract Case*, Nos. 611 and 612, p. 13), the Fourth Circuit says as to "the plan" that "the experience of twenty years shows that it is practicable and successful."

The *Safe Harbor rate case* was tried first. It resulted in FPC's Opinion No. 143 and Order of November 4, 1946 (5 F. P. C. Rep. 221), reducing the rates of Safe Harbor to Penn Water and Consolidated by approximately $600,000 annually on a 1943 basis, saying in part:

> "The interconnected system is so operated as to obtain the lowest cost for system power and energy requirements. The output of each generating facility flows into the system at such times and in such amounts as will produce economy of operation and reliability of service. * * *

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the economical, coordinated, and integrated operations of the system which result from the above-described provisions, or even of any of the provisions themselves. The Opinions in the *Penn Water Contract Case* (184 F. 2d 552, and 186 F. 2d 934) condemn as illegal *per se* only Articles IV and V of the Penn Water contract, which gave Consolidated control over Penn Water's contracts with others and over installation or disposition of generating facilities. This distinction was carefully observed by the Opinion below. It is also confirmed by the Fourth Circuit's Opinion in the recently decided *Safe Harbor Contract Case — Consolidated Gas Electric Light and Power Company of Baltimore, et al. v. Pennsylvania Water & Power Company, et al.*, decided January 3, 1952, now on petition for certiorari in Nos. 611 and 612 (pamphlet copy filed by petitioners, p. 3).

"Under a 1927 contract which, as amended, continues in effect until 1980, the Maryland Company is entitled to all the electric capacity and energy not otherwise disposed of under existing contracts or by any obligation to serve imposed upon the Pennsylvania Company (Penn Water) by its charter or by law, which is available from the Pennsylvania Company's hydro and steam plants, as well as that available to the Pennsylvania Company from Safe Harbor. The Pennsylvania Company may require the Maryland Company (Consolidated) to supply it with steam generated energy (backfeed), in excess of the Maryland Company's own requirements, up to the available capacity of the Maryland Company's generating stations then being operated. The Maryland Company agrees to reimburse the Pennsylvania Company for all of its operating expenses, including taxes, depreciation, and the cost of power from Safe Harbor, as well as a certain return, less a credit for the revenues which the Pennsylvania Company receives for local sales in Pennsylvania."

The Court of Appeals for the Third Circuit upheld FPC's decision in every respect, noting that "Safe Harbor's output is delivered to an integrated interstate electric system * * *", and held that "Safe Harbor's contracts for power and its backing by the Pennsylvania and Maryland companies *are exemplary*" (emphasis supplied). *Safe Harbor Water Power Corp. v. Federal Power Commission*, 179 F. (2d) 179, 199 (1949) cert. denied 339 U. S. 957 (1950).

In the *Penn Water rate case* (the present proceedings), hearings began on April 15, 1946, and concluded July 16, 1947, during which time 21,200 pages of Record and over 600 exhibits (R. Vols. 6-15) were received. Following submission of voluminous briefs, FPC issued Opinion No. 173 and its Order of January 5, 1949 (R. Vol. 16, pp. 4845-4997), ordering Penn Water to reduce its rates and charges, on a 1946 basis, in the total amount of approximately $2,000,000 annually. During the entire period of the proceedings be-

fore FPC, neither Penn Water nor the Pennsylvania Commission raised any question as to the validity of the long-term contracts under which the interconnected system had been established in 1931, and which as tariffs had been controlling the services of Penn Water and Safe Harbor since they were first filed in 1936 in response to FPC Order.

In its petition for rehearing filed on January 28, 1949, Penn Water asserted for the first time the fact that it considered its long-term power contracts to be null and void, and that it was making this assertion the basis of court proceedings recently instituted in the United States District Court for Maryland. Denying this petition, in its Opinion 173A and Order of February 28, 1949 (R. Vol. 16, p. 5178), FPC informed Penn Water that its rate order rested upon *services as they had been rendered since 1931*, as testified to by officers of Penn Water, and as they must continue to be rendered until changed in the manner required by the Commission's rules issued under the provisions of the Federal Power Act (Sec. 205d). FPC stated that any possible illegality of particular provisions of the contracts could not affect the rates established in relation to services actually rendered, and as they were continuing to be rendered (and have in fact continued to be rendered to the date of this brief).*

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* The Commission makes it quite clear, in its Opinion No. 173A, that it considered it improper to further delay rate reductions which were long overdue, in relation to services which had been rendered in the same manner since 1931. The Commission emphasized the testimony of the officers of Penn Water that the integrated interconnected power system was "the outgrowth of twenty years of experience by the two companies in determining the best methods of promoting the coordination of the hydro and transmission facilities of Penn Water with the steam generating plants of Baltimore Company, to the end of maximum utilization of natural resources, minimumization of investment and the utmost in service availability to the ultimate customer", and that this should not be changed except by the procedures provided by the Act (R. Vol. 16, p. 5178 at 5181-88; Vol. 1, pp. 25-26, 69).

Penn Water, although it continued its collateral attack on its long-term hydro contracts in the United States District Court for Maryland, did not choose to exercise its right to petition for changes of its tariffs as filed with FPC, or of its services as rendered thereunder. Instead, it elected to stand on the record before the Commission and to pursue its appeal from FPC's orders to the U. S. Court of Appeals for the District of Columbia Circuit, filing a 238-page printed brief, supplemented by a 49-page brief filed by the Pennsylvania Commission. FPC replied with a printed brief of 178 pages, the Maryland Commission with 36 pages, and Consolidated with 50 pages. After these main briefs were filed, and the case ready to be set for argument on the merits, Penn Water and the Pennsylvania Commission filed motions to postpone the date of oral argument. Subsequently, they filed motions to annul or remand the orders of the Commission, asserting that they had been rendered void by the decision of the Fourth Circuit in the *Penn Water Contract Case*. The Court allowed time for extended briefing and argument of these motions, assigning the case for three days of oral argument, divided between the motions and the appeal on the merits.

Having failed, after these extended briefs and arguments below, to convince the Court of Appeals that there was any error in the rate orders based on that Record of over 21,200 pages (plus over 600 Exhibits)* as conducted from

* The printed record in the Court below consisted of 4805 pages, plus an additional 514 pages of Appendices to Penn Water's Briefs. As is indicated in the first footnote of page 2 of Penn Water's petition for certiorari and repeated in its brief p. 3, note "**", it sought to restrict the Record here. If this had been accomplished, the Court would not have before it the real nature of the case and the Record which shows the ample and complete support for the Commission's Orders, including the evidence of Penn Water's officers R. Vol. 1, pp. 20-28, 31-46, 69), showing their sworn support of the integrated interconnected power pool — quite contrary to their later collateral

September 1, 1944, to July 16, 1947, and culminating in the Order of January 5, 1949, petitioners now seek to have the entire effect of those proceedings destroyed and the purposes of the Federal Power Act frustrated, by insisting that the Court below erred in refusing to annul or remand the Orders because of the collateral determination subsequently obtained by Penn Water in the Fourth Circuit, in the *Penn Water Contract Case* — proceedings to which FPC was even not a party.

The Court below, in response to the motions to annul, indicated that what might be illegal as contract between the parties, as constituting a monopoly in violation of the Sherman Act, might nevertheless be valid as a rate and service order of FPC, acting in pursuance of the directive of Congress specified in the Federal Power Act (R. Vol. 18, pp. 5370-5375). The Court below, however, did not rest with this reconciliation of the Commission's orders with the Opinion of the Fourth Circuit in the *Penn Water Contract Case*. Regardless of such reconciliation, it based its decision squarely on its holding that, if Penn Water had any right to change its services or rates as a result of having had its contracts declared illegal in violation of the Sherman Act, it should pursue its legal remedies under the Federal Power Act, as it had first been directed to do by FPC when the petition for rehearing was denied (R. Vol. 18, pp. 5375-5376).

## ISSUES PRESENTED BY PETITIONERS AND OUTLINE OF ARGUMENT IN RESPONSE

Petitioners, Penn Water (brief, p. 3) and Pennsylvania Commission (brief, p. 13) separately state three issues which they seek to have determined by this Court. Be-

efforts to destroy the benefits of that pool by attacking the contracts which put it in operation, and the rate orders which now continue it in effect.

cause of the duplication involved in Penn Water's issues I and II and the Pennsylvania Commission's issues II and III, all of which seek to present a single issue not properly reviewable by this Court on the instant Record, there are only three basic questions presented by petitioners:

I. *Did the Court below err in holding that "where electric energy is produced in Pennsylvania and thereafter sometimes commingled with electric energy flowing from another state and sold to Pennsylvania customers and where the proportions of such respective energy are ascertainable, such sales are in interstate commerce within the scope and intendment of the Federal Power Act and subject to the jurisdiction of FPC"?* (PUC brief, p. 13.)

This issue, presented by the Pennsylvania Commission alone, rests upon a conclusion of fact contrary to that determined by FPC upon substantial evidence (FPC found that Penn Water has no *separable* intrastate sales). The assertion that Penn Water's sales to its Pennsylvania customers can and should be treated as sales in intrastate commerce, subject to the jurisdiction of the Pennsylvania Commission (PUC brief, pp. 15-19), is contrary to the nature of such sales and the facts of combined hydro-steam operation of the integrated system, as found by FPC upon substantial evidence and confirmed by the Court below (R. Vol. 18, pp. 5382-5384). Petitioner thus asks this Court, contrary to long-established law, to substitute its judgment for that of FPC, upon just the kind of complicated engineering and economic facts which FPC is best qualified to determine.

Petitioner draws no support from the two principal cases upon which it relies, *Peoples Gas Company v. P. S. C.*, 270 U. S. 550 (1926) and *Lone Star Gas Co. v. Texas*, 304 U. S. 224 (1938), both of which were determinations of the ex-

tent of state power over commerce *in the absence of federal regulation.* Those cases confirmed determinations of the fact of separability of the intrastate commerce involved therein, as made by the Commission in the first instance. The latter case dealt solely with a problem of local distribution consistently recognized to be intrastate, a factor which is clearly not involved in the instant case.

No further argument will be submitted on this issue, for it is obviously correctly decided by the Court below upon the reasoning referred to in the record reference above (Vol. 18, pp. 5382-5384).

II. *Is a licensee subject to regulation under Part I of the Federal Power Act also subject to regulation as a public utility under Part II of the Act?* (P. W. brief, pp. 3, 19, 23, 76.)

This issue is presented by Penn Water alone. The Court below, in affirming FPC's decision that Part II applies to licensee-public utilities, correctly followed the determination of the Court of Appeals for the Third Circuit in the *Safe Harbor rate case — Safe Harbor Water Power Corporation v. FPC,* 179 F. 2d 179, 185 (1949) cert. den. 339 U. S. 957 (1950) — which is the only other opinion which has dealt squarely with this question.

No further argument thereon will be submitted herein, because the subject is adequately disposed of by the Opinions of the two Courts of Appeals, for the Third Circuit and the District of Columbia Circuit. What we would argue would of necessity be repetitious thereof, as well as what has been presented by FPC in its opinions and brief.

Petitioner, Penn Water, has resolved its issues I and II (and the Pennsylvania Commission's corresponding issues III and II) into one issue which is stated (P. W. pet., pp. 2-3; brief, p. 3):

III. *"The primary issue in this case is whether the FPC *.* * may compel electric utilities to perform, and may base its rate orders upon continued performance of, contracts which have been adjudged by the courts to violate Federal antitrust laws, public policy and the laws of the utilities' state of incorporation".*

This simplified statement, like the more complicated questions stated in the petitions and repeated characterizations in the briefs, is very carefully worded in a manner designed to create the impression that such an issue had been raised in the proceeding before FPC, had been ruled upon by FPC after evidence and argument, and was then confirmed by the Court below. Actually, the issue stated by petitioners here was *never presented to FPC,* and was not accepted as an issue by the Court below.

At best, only an approximation of it was suggested by Penn Water's petition for rehearing. In response thereto, FPC pointed out that if Penn Water desired to raise such questions (which it had ignored during the four years that the rate case was in progress, and which involved a disruption of the integrated power system as Penn Water had presented it to FPC), the provisions of the Commission's rules and the Federal Power Act relative to change or withdrawal of tariffs should be complied with (R. Vol. 16, pp. 5181-5188).

In confirming FPC's denial of Penn Water's petition for rehearing, the Court below makes the squarely procedural administrative law determination that Penn Water could not present to the Court of Appeals *for the first time,* as basis for setting aside or remanding FPC's Orders, matters which the petitioners had ignored during the course of hearings before the Commission, which they had subsequently made the basis of a collateral attack in Court pro-

ceedings to which FPC was not a party, and for which the Federal Power Act specifies a proper procedure of presentation in the first instance to FPC (R. Vol. 18, pp. 5375-5376). That was the basis of the decision below, which petitioners seek to avoid by misstating the issue to this Court, in Penn Water's issues I and II and the Pennsylvania Commission issues III and II, and the arguments related thereto.

Phrased succinctly as a legal proposition for review by this Court, the only proper issue related to and including all of these questions (as embodied within issue III), and properly stated in relation to the record in this proceeding, is:

*Was the Court of Appeals, as the tribunal established by law to review decisions of the Federal Power Commission, correct in affirming a decision of the Commission that the Federal Power Act requires a regulated licensee and utility to charge the rates and to perform the services required by order of the Commission, supported by an extended record and issued after protracted hearings, until that utility has sought and obtained a change of its rates and service under procedures duly established by the Commission under the Act?*

The Court below correctly answered that question in orthodox fashion, under well-established doctrines of administrative law consistently confirmed by this Court.

If petitioners wish a determination of what they erroneously claim to be "the primary issue" of this case, they should present that issue in *original* proceedings before FPC, where a complete record may be made with reference thereto. After such proper procedure has been followed and FPC has issued an order resting on such a record, the parties interested may, or may not, desire and petition

for judicial review thereof. In any event, only then will Penn Water's asserted "primary issue" be ripe for determination.

## SUMMARY OF ARGUMENT

Because of the vigor of petitioners' procedurally unlawful attack as made herein upon the FPC Orders, and because of the vital importance to the Maryland public of the substantial rate reductions involved, we urge upon this Court (with detailed argument to follow) that the decision below should be affirmed for the following reasons:

1. *Petitioners' arguments that the FPC Orders should be annulled rest upon decisions of the Fourth Circuit, which lacked jurisdiction to make those decisions because of the broad doctrine of "primary jurisdiction", as confirmed by the recently decided Far East Conference case (Argument 1 hereinafter,* p. 21).

The Federal Power Act (16 U. S. C. 791a-825r, pamphlet copy filed by FPC) confers on FPC detailed and comprehensive powers to secure uniform and consistent regulation of licensees and public utilities such as Penn Water and Safe Harbor. The *Far East Conference* case (20 L. W. 4207, Mar. 10, 1952) confirms the doctrine of "primary jurisdiction" which runs back to *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), and which establishes the fact that the Fourth Circuit had no power to render the decisions herein relied upon by petitioners.

The broad and properly applicable doctrine of administrative law is not to be avoided by petitioners' attempts to convert the argument into one of "repeal by implication" of the Sherman Act. As was stated clearly by the Court below (R. Vol. 18, pp. 5371-5372), the Sherman Act is of lim-

ited application in this field of government-regulated monopoly. The Fourth Circuit had no jurisdiction (and should have declined to exercise jurisdiction) to apply the Sherman Act in contravention of: (a) the facts, and (b) the purpose and policy of the Federal Power Act.

*2. The theory of the "filed tariff", as embodied in Section 205 of the Federal Power Act, precludes petitioners from asserting a collateral destruction of the tariffs and the rate orders of the FPC (Argument 2 hereinafter, p. 31).*

Assuming *arguendo* that the Fourth Circuit had jurisdiction to render the decisions on which petitioners here rely, the motions to annul or remand were nevertheless correctly denied. To grant them would give court decisions declaring Penn Water's power contracts invalid (on their face, without regard to the facts of operation, or the public necessity and benefits involved in the existing service and the continuance thereof) the collateral effect of annulling FPC Orders based upon voluminous record and argument *in which no question was ever raised as to the validity of such contracts*, although they constituted the filed tariffs controlling the service and rates to be regulated. When such tariffs have been confirmed (as here) by rate orders after formal hearings, they constitute the only lawful terms of service and may be changed only in the manner established by law (Federal Power Act, Sec. 205d) — namely, by proceedings beginning before FPC. To hold otherwise, would be a departure not only from the explicit statutory provisions of Section 205 embodying the doctrines of the filed tariff, but likewise would violate the sound administrative law doctrines of "primary jurisdiction" and "exhaustion of administrative relief".

3. *The Rate Orders Should Not Be Annulled or Remanded Because of the Sherman Act (Argument 3 hereinafter*, p. 43).

FPC orders establishing rate schedules relating to operations, fully supported by an extended record and hearings before the Commission, are acts of the Federal Government and are not dependent for their authority upon the contractual consent of the parties which began those operations. As acts of the government (even if they ordered what would be proscribed to private parties by the Sherman Act), they are not subject to the Sherman Act.

The rate orders here in question, however, were issued by FPC so as to apply only to service arrangements which would, in and of themselves, be lawful. FPC has construed the rate schedules of Penn Water to Consolidated as not to include Article IV and V of the Penn Water contract, which were the only provisions thereof found by the Fourth Circuit to be *per se* unlawful. Accordingly, there is no provision of Penn Water's prescribed rate schedules subject to the charges made herein by Penn Water.

Furthermore, even as contracts, and in their entirety, the Penn Water contract and the Safe Harbor contract do not violate the Sherman Act. They were proper business arrangements for developing a great natural resource and for securing the maximum benefits therefrom to the public. They are clearly valid under proper application of the rule of reason.

4. *The Rate Orders Should Not Be Annulled or Remanded Because of the Pennsylvania Public Utility Law or Public Policy (Argument 4 hereinafter*, p. 52).

The FPC Orders here involved relate to *service* of Penn Water which is entirely interstate in character (as is like-

wise true of Safe Harbor), and as such is not subject to any of the laws or policy of Pennsylvania as urged by petitioners.

## ARGUMENT

**1. Petitioners' arguments that the FPC Orders should be annulled rest upon decisions of the Fourth Circuit, which lacked jurisdiction to make those decisions because of the broad doctrine of "primary jurisdiction", as confirmed by the recently decided Far East Conference case.**

In the recent case of *Far East Conference, United States Lines Company, States Marine Corporation et al. v. The United States of America and Federal Maritime Board*, 20 L. W. 4207 (March 10, 1952), this Court denied the right even of the United States to sue in the first instance in the District Court to enjoin a dual-rate system alleged to be in violation of the Sherman Act. In that opinion, this Court confirmed its earlier decision of *United States Navigation Co. v. Cunard Steamship Co.*, 284 U. S. 474 (1932), and stated the applicable principles which condemn the action of the Fourth Circuit in the *Penn Water Contract Case*, upon which Penn Water here relies:

> "* * * in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agen-

cies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure".

The exclusive primary jurisdiction of FPC, which deprives the Fourth Circuit of original jurisdiction and authority in the two contract cases, is founded upon the broad powers conferred by the Federal Power Act (16 U. S. C., Secs. 791a-825r; citations of sections which follow are to the pamphlet copy filed herein by FPC).

Section 207 empowers FPC, in case any interstate service of a public utility is inadequate, to determine the proper service to be rendered and to "fix the same by its order".

Section 206 empowers the FPC, if it finds that any rate, charge, or classification in any interstate sale or any *contract affecting* such rate, charge or classification is unjust, unreasonable, unduly discriminatory or preferential," to determine "the just and reasonable rate, charge * * * or *contract* to be thereafter observed and in force" and to "*fix the same by order*".

Section 205, providing for just, reasonable, and nondiscriminatory rates, requires "all *contracts which in any manner affect or relate* to such rates, charges, classification and service" (Sub-par. (c)), for interstate sales by public utilities of energy at wholesale, to be filed with the FPC under rules to be established by FPC and prohibits any changes in such contracts until after thirty days' notice to the FPC and the public (Sub-par. (d)).

Section 202(b) authorizes the FPC to require a public utility, if its generating facilities and output are sufficient for the purpose, to establish physical connections with, and make sales of energy to, other electric companies and to "*prescribe the terms and conditions of the arrangement*

to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them" (Emphasis added to the foregoing excerpts).

Section 10(b) prohibits a licensee from constructing any additions of capacity in excess of 100 horsepower to a licensed project "without the prior approval of the Commission".

Section 8 provides that "no voluntary transfer of any license or of the rights thereunder granted shall be made without the written approval of the Commission * * *".

Section 309 empowers the FPC by order, rules, and regulations to carry out and enforce the provisions of the Federal Power Act.

Section 313 provides the exclusive method by which such orders of the FPC may be reviewed by the Court of Appeals.

As the opinion below pointed out, certain underlying objectives of a regulatory statute, such as the Federal Power Act, are sometimes at variance with certain underlying objectives of the Sherman Act. Nevertheless, it is FPC's duty, in exercising its jurisdiction, to reconcile and accommodate these two Federal enactments to the specific problems before it. *The vehicle for this accommodation and reconciliation in a particular case is the rule of reason.* If, in appraising the validity of a tariff, FPC observes and stays within the rule of reason, the Sherman Act and the Federal Power Act can be read together, accommodated, reconciled, and applied to accomplish the underlying policies of the two enactments. The statutory standard of the Federal Power Act is reasonableness. Just and reasonable rates, services, and contracts of licensees and public utilities subject thereto are objectives of that Act. Such is

also the statutory standard of reasonableness which has been read into the Sherman Act. We submit that the District of Columbia Circuit had these considerations in mind when it said in its opinion below (R. Vol. 18, pp. 5371-5373):

> "In place of competition as a generalized and indirect regulator of prices and services in the field of interstate transmission of electric energy at wholesale, Congress has substituted a regulatory agency authorized to supervise almost every phase of the regulated company's business. Rates charged by such utilities, *as well as the services and contractual provisions affecting them,* must be 'just and reasonable.' And what is 'just and reasonable' is not determined by the pressures of competition but by the adequacy of the service to the public, the fairness of the return allowed upon the investment in the company, and the degree to which the congressional objective of efficient use of the nation's power resources is served. * * *
>
> "These contrasting objectives indicate that the antitrust laws can have *only limited application* to industries regulated by specific statutes. * * *
>
> "The net effect of what we have already said is that, though regulated industries are not *per se* exempt from the antitrust laws and appeals by implication are not favored, the antitrust laws are superseded by more specific regulatory statutes *to the extent* of the repugnancy between them. That is not to say that competitive considerations may not be components of the public interest sought to be served by a particular regulatory statute, and hence a guide to a commission's exercise of its authority *when the question is properly before it.* * * * But where a statute provides for comprehensive and detailed regulation of a particular industry, as do the Interstate Commerce Act and the Federal Power Act, there is, as we have indicated, only a limited area for application of antitrust considerations to Commission decisions." (Emphasis added.)

The question whether the Penn Water contract and the Safe Harbor contract are reasonable and in the public interest under the "just and reasonable" standards of the Federal Power Act, and the "rule of reason" standard of the Sherman Act, is peculiarly a question for FPC determination, with its expert technical and engineering resources. It is not a question to be decided collaterally in a summary proceeding in the District Court on the face of those tariffs alone; but only after all of the surrounding facts have been fully explored, intelligently appraised, and applied by an administrative body competent to do so. Otherwise, there may be conflict between the two enactments separately applied to the same tariffs by different tribunals. Variance in the application of the laws is bound to result.

We submit that these were the considerations which led this Court, in *U. S. Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474, 485, 487, to say:

> "Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, *generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal.*
>
> "* * *
>
> "Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

Any consideration of the facts of the relations between Penn Water, Safe Harbor, and Consolidated, as shown by the record herein before FPC and as summarized in its Opinion 173A (R. Vol. 16, p. 5178) demonstrates vividly how the failure of the Fourth Circuit to observe these long-established principles, as confirmed by the *Far East Conference* case, resulted in its erroneous assertion of jurisdiction to apply the Sherman Act in condemnation of tariffs on file with FPC. Its action thus disrupts the "uniformity and consistency in the regulation of business entrusted to a particular agency" and threatens grave injury to the public interest by destroying the reasonable prices which both the Sherman Act and the Federal Power Act were designed to protect.

Petitioners seek to avoid the need for FPC to exercise its primary jurisdiction, by asserting that the Federal Power Act confers no specific authority to exempt utilities from the application of the Sherman Act. But FPC has asserted no such authority to exempt. It asserts that *its orders* are not affected by the Sherman Act; but, if they are subject to its provisions, they prescribe nothing that is contrary to the Act. Furthermore, no specific authority to exempt is required for the application of the normal rules of primary jurisdiction and exhaustion of administrative relief.

Petitioners' entire argument to annul the existing rate orders rests upon the Fourth Circuit Opinions in the *Penn Water Contract Case* (184 F. 2d 552, 186 F. 2d 934, cert. denied 340 U. S. 906) and in the *Safe Harbor Contract Case* (pamphlet opinion filed by petitioners — *Consolidated Gas Electric Light and Power Company, et al, v. Pennsylvania Water & Power Co., et al.*, January 3, 1952, cert. requested February 23, 1952 in Nos. 611 and 612, current term).

In the *Penn Water Contract Case*, the Fourth Circuit relied primarily upon the inapplicable decisions of *U. S. Alkali Ass'n. v. U. S.*, 325 U. S. 196 (1945), and *U. S. v. Borden Co.*, 308 U. S. 188 (1939). Neither of these cases involved a comprehensive and detailed plan for the uniform and consistent regulation of an entire business or industry on a national scale by an independent regulatory commission, such as is the purpose of the Interstate Commerce Act, the Shipping Act, or the Federal Power Act.* The Fourth Circuit brushed aside the clearly applicable decision of *U. S. Navigation Co. v. Cunard S.S. Co.*, 284 U. S. 474 (1932), and related decisions under the Interstate Commerce Act.**

Although the Fourth Circuit correctly stated that "the maintenance of uniformity of regulation and the control of the activities of an industry of national scope by a specialized body are as important in the field of electric power as in the field of transportation or water", (*Penn Water Contract Case*, 184 F. 2d 552, 564), it justified its frustration of that principle by stating that "the control of the Federal Power Commission over the power sites of

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* It is further pointed out: (1) In each of these cases, relied on by the Fourth Circuit, there had been only inaction by the regulatory authority empowered to act (as distinguished from here, where FPC has acted in broad approval of the arrangements involved); (2) in the *Alkali* case, the agency lacked power to deal conclusively with the subject matter (325 U. S. 195, 205, 210); and (3) in the *Borden* case (308 U. S. 188, 204-205), the agency's power to deal at all with the subject matter was questioned. In the *Borden* case, the Court pointed out that while there was administrative power under the *Capper-Volstead* Act to control "*producers*" of agricultural products and their rights to combine with *each other*, the administrator's power did not cover "combination or conspiracy with *other persons* in restraint of trade". This was the situation in *Hinton v. Columbia River Packers Ass'n.*, 131 F. 2d 88 (1942), also cited by the Fourth Circuit to support its result.

** Particularly relevant here are *Terminal Warehouse Co. v. Penn. R.R. Co.*, 297 U. S. 500 (1936); and *Keogh v. C. & N. N. W. Ry. Co.*, 260 U. S. 156 (1922).

the country and over the interstate transmission of electric energy is not disturbed by the retention of the jurisdiction of the courts to enforce the anti-trust acts". The Fourth Circuit erroneously relied on *Georgia v. Pa. R. R. Co.*, 324 U. S. 439 (1945), despite the fact that this Court, in sustaining the right of the State of Georgia to bring an original proceeding in this Court to enjoin a conspiracy of carriers in violation of the Sherman Act (and then only with a strong dissent by four Justices), explicitly stated that its Opinion would not support "an injunction against the continuance of any tariff" or a proceeding "to have any tariff provision cancelled" (324 U. S. 439, 455). This Court, by the use of this language, sought to preclude the very result which the Fourth Circuit obtained in the *Penn Water Contract Case.*

This Court's denial of certiorari in the *Penn Water Contract Case,* as indicated in the citation above, does not confirm the action of the Fourth Circuit as being correct. It "imports no expression of opinion upon the merits of the case". *Agoston v. Commonwealth of Pennsylvania,* 340 U. S. 844 (1950); *Sunal v. Large,* 332 U. S. 174, 181 (1947); *House v. Mayo,* 324 U. S. 42, 48 (1945).

The petitioners now assert the *Penn Water* contract decision as basis for direct annulment of the tariff. Thus, it is incumbent upon this Court to declare the error of the Fourth Circuit's Opinion in asserting jurisdiction over matter subject to the primary jurisdiction of FPC.

The *Safe Harbor* contract opinion perpetuates and relies upon the above-described jurisdictional errors of the *Penn Water Contract Case.* It went further than the *Penn Water* contract opinion, however, in making explicit the Court's belief that it had collaterally destroyed FPC Orders, saying:

"Further proceedings before the Federal Power Commission will doubtless be necessary * * *. The problem of the Commission would then be to devise a plan which will effectuate the purposes of the Federal Power Act and at the same time conform to the anti-trust statutes." (pamphlet opinion of Jan. 3, 1952, filed by petitioners, p. 22.)

In the *Safe Harbor Contract Case*, the Fourth Circuit affirmed a *summary judgment*, in complete disregard of the facts as supported by answer and affidavits of Consolidated (and as sought to be presented in FPC's petition to intervene, which was denied), and in further disregard of FPC's assertion (in its brief filed with the Fourth Circuit) that it had ordered as a rate schedule the entire Safe Harbor contract. In the above-quoted statement, the Fourth Circuit flatly ignored the fact that FPC had thus already expressed its deliberate judgment, based upon an extended record, as to the relation between the policy of the Federal Power Act and the facts found by the Commission.

This action of the Fourth Circuit was in clear disregard of *Georgia v. Pennsylvania R. R.*, *supra*, and the policy expressed in the *Far East Conference* opinion quoted above. Certiorari has been requested and is now pending decision in Nos. 611 and 612. It should be granted and the decision of the Fourth Circuit reversed.

This Court has many times required exhaustion of administrative relief as to matters submitted to administrative control, before permitting Court action upon matters of law related thereto.

*Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938);

*FPC v. Metropolitan Edison Co.*, 304 U. S. 375 (1938);
*Macauley v. Waterman S. S. Corp.*, 327 U. S. 540 (1946);
*Aircraft & Diesel Equipment Co. v. Hirsch*, 331 U. S. 752 (1947).

This Court has made it clear not only that exhaustion of administrative relief is required, but that the administrative determination takes on a high degree of finality as to the "coverage" of the statute under which an agency acts, because the agency is better qualified than the Courts to understand the facts and construe the basic statutes in relation thereto.*

*Gray v. Powell*, 314 U. S. 402 (1941);
*Endicott Johnson Corp. v. Perkins*, 317 U. S. 501 (1943);
*Oklahoma Press Co. v. Walling*, 327 U. S. 186 (1946);
*National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111 (1949).

The Fourth Circuit's decisions violate all the rules so carefully established by this Court for "the complementary roles of courts and administrative agencies in the enforcement of the law". Its decision should be respectively overruled in the *Penn Water Contract Case*, and reversed in the *Safe Harbor Contract Case*, now pending on certiorari, and the FPC Orders herein affirmed in their entirety.

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* There could be no better illustration of a Court's inherent technical disadvantage than the Fourth Circuit's failure to understand the engineering and the economic aspects of the instant controversy. Even worse is its disavowal of any interest in any argument that the engineering and economic factors should be given weight in its deliberations (184 F. 2d 552, 559 Par. [6] "it is idle to consider", etc. — a clear repudiation of interest in the benefits of coordinated operation and economy which the contracts effected, and which it was the duty of FPC, under the Federal Power Act, to foster and achieve).

**2. The theory of the "filed tariff", as embodied in Section 205 of the Federal Power Act, precludes petitioners from asserting a collateral destruction of tariffs or rate orders of the FPC.**

Assuming *arguendo* that the Fourth Circuit was correct in determining that it had authority to strike down contracts (*qua* contract) despite their partial or total identity with tariffs on file with and approved by FPC, the Fourth Circuit decisions do not have the collateral effect of destroying the FPC orders, as is now asserted by petitioners. If they could have this effect, petitioners are completely sustained in their bold attempt to flout the doctrines of primary jurisdiction, exhaustion of administrative relief, and administrative supremacy as to matters committed to Commission control; furthermore, Section 205 of the Federal Power Act (which provides for the filing of rate schedules for service by utilities subject to FPC regulation and constitutes such filed tariffs the only lawful terms of service until changed after petition to and hearing by the Commission) might just as well have been omitted from the law. Section 205 provides in part as follows:

> "(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, * * * schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with *all contracts* which in *any manner* affect or relate to such rates, charges, classifications and services.
>
> "(d) Unless the Commission otherwise orders, *no change* shall be made by any public utility in *any such* rate, charge, classification, or service, or in any rule, regulation, or *contract* relating thereto, except after thirty days' notice to the Commission and to the public." (Emphasis added.)

When Penn Water, in its petition for rehearing before FPC, suggested for the first time to FPC that the basic power contracts were invalid and had been placed in litigation in the Courts, the Commission informed Penn Water that the Commission's rate order did not rest upon the decision of "questions as to the legality of the foundation contracts which are in litigation", but rather was founded upon the *operations* of the combined system and the *services* as actually rendered by Penn Water (Opinion 173A, R. Vol. 16, pp. 5181-5188).

FPC pointed out that Penn Water's petition sought to present only certain new legal arguments, which could have been presented to the Commission and which had been withheld, concerning contractual provisions (Articles IV and V), the asserted illegality of which would not affect the findings of fact upon which the rate order was based. As to asserted changes in operations (which Penn Water was restrained from continuing because of the hazards to the system), FPC said that until such operations and services were changed with the approval of the Commission, under the rules and regulations issued in pursuance of Sec. 205 of the Federal Power Act, Penn Water was bound to continue such operations and service at the reduced rates prescribed by the Order of January 5, 1949.

FPC thus met Penn Water's eleventh hour maneuver — a collateral attack to avoid the long overdue rate reduction — by referring Penn Water to the orderly processes of the law as prescribed by the Federal Power Act, implemented by FPC rules. If there was no error in this denial of the petition for rehearing (and we submit there was none), there was likewise none in the affirmance thereof by the Court below.

The provisions of the Penn Water contract regarded by the Fourth Circuit to be invalid *per se* (Articles IV and V only)* have played no part in the rate orders of the Commission. The services, originally begun under the contracts in 1931, have continued in exactly the same manner from 1931 to the present date. Obviously there must be rates to pay for such services, regardless of contract. Under the law, they are the just and reasonable rates allowed by the Federal Power Act and prescribed by FPC in its Orders here under attack.

Petitioners insist that the rate orders, although prescribing reasonable rates for services based on operations as validly found by FPC,** must be destroyed because of the illegality of the contracts; and moreover, (by inference here and statement to the Court below) they still claim the right to keep the exorbitant rates prescribed by the very contracts which they claim to be illegal. In all equity and justice, there was never a clearer case for upholding the orderly processes of the law to defeat such unconscionable conduct.

What petitioners overlook is that when Penn Water filed its contract as a tariff in 1936 under the Federal Power Act, its former obligations to serve under the contract and at the rates therein prescribed passed out of the realm of contract and into the area of duty prescribed by law. The *tariffs* (not the contracts), from that date and until with-

* The Fourth Circuit's holding that the Penn Water contract was invalid only because of the provisions of Articles IV and V appears in at least three places in its first opinion (R. Vol. 18, pp. 5328, 5329, 5346), in its second opinion (R. Vol. 18, p. 5358), and also in its opinion in the *Safe Harbor Contract Case* (p. 3 of printed pamphlet copy supplied by Penn Water).

** Petitioners have abandoned any attempt to show any illegality in the order based on the record before FPC, except the two minor legal points in issues I and II above, pp. 14-15.

drawn or changed in the manner prescribed by the Federal Power Act (Sec. 205 as described by the Commission in its Opinion No. 173A, R. Vol. 16, pp. 5178, 5186-5188), constituted the only lawful terms of service for Penn Water.* Any departure by the parties thereto would itself be unlawful.

*Texas & Pacific Ry. v. Mugg*, 202 U. S. 242 (1906);
*Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 439-449 (1907);
*Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U. S. 566, 573 (1921);
*Davis v. Henderson*, 266 U. S. 92, 93 (1924);
*Davis v. Cornwell*, 264 U. S. 560 (1924);
*Northwestern Pub. Serv. Co. v. Montana-Dakota Co.*, 181 F. 2d 19, 22-23 (1950); affirmed *Montana-Dakota Co. v. Northwestern Pub. Serv. Co.*, 341 U. S. 246 (1951).

The Eighth Circuit's opinion in the *Montana-Dakota* case states in part:

> "The plan or scheme of the Federal Power Act is analogous to that of the Interstate Commerce Act * * *, and decisions under the latter Act should be controlling here * * * The rates filed and approved by the Commission are the lawful rates until changed in the way approved by the Act * * *
>
> "Moreover, the transmission of electric energy being at wholesale and interstate, the seller must collect the charge named in the filed rate and the purchaser must

* It has long been established administrative and utility law that, however great a regulated utility's substantive right may be, it must comply with the procedures established by the law for perfecting it.
*State ex rel. v. Kansas Postal Tel. Co.*, 96 Kan. 298 (1915), holding that a utility with a constitutional right to discontinue service, because it was operating at a loss, must nevertheless comply with the procedure of securing Commission approval to withdrawal.
*State ex rel. R.R. Commissioners v. Bullock*, 78 Fla. 321 (1919), affirmed 254 U. S. 513 (1921).

pay that rate. So long as the filed rate is not changed in the manner provided by the Act it is to be treated as though it were a statute, binding upon the seller and the purchaser alike."

This Court, in affirming on other grounds in the *Montana-Dakota* case, recognized the doctrine of the filed tariff, saying in part that the utility "* * * can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a Court can authorize commerce in the commodity on other terms". Under the above-cited cases, and upon reason as well as authority, this doctrine applies not only to rates but of necessity to the services to which the rates relate and all applicable terms of service.

The Fourth Circuit, in deciding the *Penn Water Contract Case*, must have had this law well in mind when it rested its decision partly upon the case of *Georgia v. Pennsylvania R.R. Co.*, 324 U. S. 439, 452-460 (1945). That case held that utilities as regulated industries are not *per se* exempt from the Sherman Act, but also stated clearly that in condemning a Sherman Act violation, the Court could not and would not intrude on the primary jurisdiction of the Interstate Commerce Commission over its filed tariffs.

Referring to *Keogh v. Chicago & N. W. R. Co.*, 260 U. S. 156, 161-162 (1922), the Opinion in the *Georgia* case (p. 453) states:

"* * * The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by the contract or tort of the carrier. And it added: 'This stringent rule prevails, because otherwise the paramount purpose of Congress — prevention of unjust discrimination — might be defeated. * * *' "

Referring to *North Dakota, ex rel. Lemke v. Chicago & N. W. R. Co.*, 257 U. S. 485 (1922) and *Texas v. I. C. C.*, 258 U. S. 158 (1922), the *Georgia* case (p. 454) further states:

> "It is clear that a suit could not be maintained here to review, annul, or set aside an order of the Interstate Commerce Commission. Congress has prescribed the method for obtaining that relief. It is exclusive of all other remedies, including a suit by a State in this Court. * * *"

And, after referring to and quoting *Central Transfer Co. v. Terminal R.R. Assn.*, 288 U. S. 469 (1933), which likewise involved application of the "primary jurisdiction" doctrine as explicitly embodied in the Clayton Act, the *Georgia* case (p. 455) in referring back to all of these cases said:

> "* * * *We adhere to these decisions.* But we do not believe they or the principles for which they stand are a barrier to the maintenance of this suit by Georgia.
>
> "The relief which Georgia seeks is *not a matter subject to the jurisdiction of the Commission. Georgia in this proceeding is not seeking an injunction against the continuance of any tariff; nor does she seek to have any tariff provision cancelled.* * * *" (Emphasis added.)

The Fourth Circuit was apparently mindful of these clearly established limitations upon its powers. This is evidenced by the extent to which its Opinions observe that it does not purport to interfere with the overall authority of FPC or its rate-making powers. After discussing the FPC rate opinion affirmed below, the Fourth Circuit said (184 F. 2d 552, 566) that it did not

> "undertake to gainsay the view of the Commission that *even if the restrictive conditions of the basic contract are invalid*, as to which the Commission expressed no opinion, it still has the duty and authority under the Federal Power Act to encourage and establish the interconnection of electrical facilities * * *."

At the conclusion of its Opinion in the recently decided *Safe Harbor Contract Case* (Opinion of Jan. 3, 1952, pamphlet copy filed with this Court, pp. 22, 23), the Fourth Circuit summarized its position as follows:

> *"There need be no interference with the rate making power or the overall control of the Federal Power Commission.* We repeat with respect to Safe Harbor what was said in regard to Penn Water in our prior opinions, 184 F. 2d 552, 568, and 186 F. 2d 934, 937:
>
> > *"'It is not our function in this case to decide how far the activities of Penn Water and Consolidated under the basic contract are subject to the regulations of the Federal Power Commission or the Pennsylvania Public Utility Commission, either or both.* * * * It may well be, although the present arrangement between the Maryland and Pennsylvania utilities is invalid for the reasons set forth, that an interconnection of facilities and an interchange of electrical energy between them may be continued by some method that would meet with the approval of the appropriate regulatory authority and will not offend either the anti-trust laws or the utility laws of Pennsylvania' (184 F. 2d 568)."* (Emphasis added.)

The existing FPC orders preserve just such "an interconnection of facilities and an interchange of electrical energy" in full compliance with all applicable laws, and no

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* It must be observed, however, that in the *Safe Harbor Contract Case*, the Fourth Circuit indicated its belief that "further proceedings before the Federal Power Commission will doubtless be necessary if it is decided that the three party contract, as well as the two party contract, is invalid" (quoted in part and discussed above, p. 29). If this means that the Fourth Circuit felt it had by its action destroyed the rate orders (as is assumed by Miller, J., in dissent below) then the Fourth Circuit has accomplished collaterally a review and annulment of FPC Orders contrary to the exclusive review provisions of the Federal Power Act (Sec. 313). The essence of the matter is that the Fourth Circuit lacked any such power to collaterally destroy the rate orders.

further action by FPC is necessary to that end. Having found the operations of Penn Water as conducted from 1931 to date to be in the public interest, but at unjust and unreasonable rates, FPC has prescribed just and reasonable rates and the conditions of service to which they apply (the latter being the conditions of service as previously rendered). The schedules prescribed by the Commission replace the pre-existing "filed tariffs" as well as the contracts between the parties, as far as service and rates are concerned. Even assuming that the Fourth Circuit had jurisdiction to condemn the contracts between the parties because of certain provisions which the Court deemed to be illegal *per se*, its decision can have no direct effect upon the filed tariffs or services as rendered thereunder prior to the effective date of the FPC Orders, nor can it have any direct effect upon the schedules required by those Orders, which continue operations and services found to be in the public interest and establish reasonable rates therefor.

Petitioners asked the Court below and now ask this Court improperly to accept the Fourth Circuit decisions, without any inquiry into their merits, as the basis for annulling the FPC rate orders. The Court is asked to do so, without any record from FPC as to its views after hearing and argument before it, regarding the matters urged upon and accepted by the Fourth Circuit. Only if such hearing and argument is had before FPC *in advance of determination of such questions by the Courts* can there be a proper reconciliation of the policy of the Sherman Act and the Federal Power Act, and proper uniformity and consistency of regulation attained.*

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* See argument and cases above, pp. 29-30, showing the need for exhaustion of administrative relief even as to questions of law, and the advantages attached to administrative determination of "coverage" of the statute.

Petitioners' arguments constitute a studied and carefully presented attempt: first, to divert this Court's attention from the purely procedural administrative law determination made by the Court below in denying petitioners' motions to annul; and second, to attract the Court's attention to an asserted conflict between the views of the Fourth Circuit and the Court below as to the interrelationship of the Sherman Act and the Federal Power Act, which had not been presented to FPC and hence could not have been covered by its Orders. They almost ignore the nature of the findings of the Court below that the Federal Power Commission, after 21,200 pages of record, has issued opinions and orders clearly within its jurisdiction under the Federal Power Act and amply supported by evidence in that record.

The Court below, faced with petitioners' motions to annul or remand (which made there the same studied presentation as is made here), painstakingly considered whether the Fourth Circuit's decision regarding the applicability of the Sherman Act, the Pennsylvania public utility laws, and public policy to the long-term power contract between Penn Water and Consolidated would apply equally to the FPC rate orders. It was claimed below, as here, that the Fourth Circuit decisions had the collateral effect of destroying the rate orders without further inquiry.

In answering the argument of petitioners, the Court below expressed its opinion that integrated electric power service arrangements which might be illegal as entered into by agreement of the parties (whether because of the Sherman Act or some other law) might, nevertheless, be lawful if compelled by Congress acting through a duly established regulatory agency (R. Vol. 18, pp. 5370-5374). This was correct. The Court was also correct in not basing

its decision upon its opinion as to this or any other matter which might be within FPC's primary jurisdiction to determine in the first instance. It clearly pointed out to petitioners that if a definitive decision as to such matter is to be had, it must occur only after petitioners (or others) have properly presented the matter to FPC, under its rules made in proper pursuance under the applicable provisions of the Federal Power Act. The Court below said (R. Vol. 18, pp. 5375-5376):

> "In our view, the Fourth Circuit's opinion neither purported to nor did relieve Penn Water from its obligation under the Federal Power Act to continue the then existing services and rates. *It is those services and rates, reflecting underlying operations, which were the subject of the Commission's order.* 'A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the regulatory statute. *The validity of Commission action in this proceeding must be determined in light of the criteria furnished by the Federal Power Act, as applied to the operations and arrangements under scrutiny. If jurisdiction was properly assumed by the Commission, if its rate order is 'just and reasonable' within the meaning of the Federal Power Act, and if its findings are supported by substantial evidence, Penn Water can have no complaint and our review is at an end. If petitioners, as a result of the Fourth Circuit's decision, wish to make any changes in operations, contracts, arrangements, etc., within the jurisdiction of the Federal Power Commission, they must do so in accordance with the Federal Power Act.* Under §205(d) thereof, 'Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public.' Pursuant to that section, petitioners may submit new arrangements

and rates based thereon to the Commission. And the Commission 'either upon complaint or upon its own initiative without complaint' may 'enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service * * *.' *If Penn Water feels itself aggrieved after such proposed changes have been acted upon by the Commission, it may at that time bring a new petition for review.* In short, a 'rate established in the mode prescribed should be deemed the legal rate and obligatory alike upon carrier and shipper until changed in the manner provided' by the statute." (Emphasis added.)

This portion of the Opinion shows the real procedural nature of the Court's decision below. It states sound basis for affirmance here.

The Court below determined, on the record as made before FPC, that those matters left for review by the Court under the review provisions of the Federal Power Act (Sec. 313), concerning the FPC's power to determine just and reasonable rates and terms of service, were properly decided by FPC. The decisions of the Fourth Circuit in both contract cases affect in no way the justness or reasonableness of the FPC rate orders in relation to the facts of operation. Penn Water does not (and cannot) deny that services have continued during the period subsequent to February 1, 1949, in the same manner as they have always been rendered since 1931 and as testified by Penn Water's officers before FPC. If the Fourth Circuit decisions can have any effect upon the future reasonableness of the rate orders, particularly with regard to any desire of Penn Water to offer services in different form, or at different rates, this issue remains to be raised and established by Penn Water in the orderly manner prescribed by Section 205(d) of the Federal Power Act, and upon a properly made new record with reference thereto. It presents no basis for condemning the orders in this proceeding.

The benefits to the public which will result from the final, but much delayed, affirmance of FPC's Orders should not be further delayed. Again, the opinion below succinctly summarizes the legal and practical reasons why the motions to annul or remand were denied, which reasons apply equally to support affirmance here (R. Vol. 18, pp. 5376-5377):

> "To grant petitioners' motions and set aside the order at this time would be to substitute antitrust criteria for those of the Federal Power Act, a substitution which would be at cross-purposes with the intent of Congress. It would result in the reopening of a rate proceeding begun in 1944 because of an issue raised for the first time on rehearing in 1949 and a decision handed down in a suit between private parties under a non-controlling statute in 1951. In view of this chronology, we think the Supreme Court's statement in *Interstate Commerce Commission v. Jersey City*, 322 U.S. 503, 514 (1944), is especially pertinent: 'If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.' *The effect of granting petitioners' motions would be to disrupt a pattern of regulation which was carefully drawn to meet the problems of a complex industry.*" (Emphasis added.)

Petitioners are not harmed by an affirmance of the decision below, which would leave to Penn Water its orderly remedy by way of petition to FPC to change its services and rates, provided it can show justification for such changes. In the meantime, service will be rendered, in the same manner it has been rendered since 1931, under tariffs which were found by FPC to be in the public interest as to the integrated coordinated power system created thereby.

The rates have been prescribed as just and reasonable upon a record which contains no reversible error.

Any result, other than affirmance of the result below, would perpetrate a gross injustice upon the Maryland rate-paying public, and would lead only to the chaos and confusion which the Federal Power Act sought to avoid by providing for the filing of new tariffs with the Commission when a change in service is sought, whatever the reason for change may be.

This Court should decline to issue judgment in this case upon the questions presented by Penn Water and the Pennsylvania Commission as to whether the rate orders of the Commission here involved are fraught with the illegalities attributed (and we believe erroneously attributed) to the contracts, as contracts. That question can be answered properly by a Court only after Penn Water has made a proper record with reference thereto before the Federal Power Commission, in conformity with the orderly processes prescribed for making a change in its services and rates. The following argument, however, briefly shows that the rate orders do not violate either the Sherman Act (and related federal laws), or the Pennsylvania law, or public policy.

### 3. The Rate Orders should not be Annulled or Remanded Because of the Sherman Act.

#### a. The Rate Orders are official acts of the United States Government, and as such, are not subject to the Sherman Act.

As held by the Court below (R. Vol. 18, pp. 5367-5376), the rate orders were issued in direct pursuance of authority conferred by the Federal Power Act. As such, they are acts of the United States Government which are not to be

stricken down by a statute of that Government passed many years earlier to control the acts of private individuals, not the Government. *Parker v. Brown*, 317 U. S. 341, 350-352 (1943). If a State, as in *Parker v. Brown*, may order action by individuals, which if taken on their own initiative would violate the Sherman Act, the same doctrine most certainly protects the act of the Federal Government in prescribing the existing FPC rate orders.

FPC has not ordered, as contended by petitioners, a violation of the Sherman Act, or approved action of private individuals taken in violation of the Sherman Act. It does not purport to free or authorize Penn Water, Consolidated, Safe Harbor, or any others, to contract or combine in violation of the Sherman Act or any other law. It has in fact issued rate orders in pursuance of authority of the Federal Power Act, which accomplish the very purpose of the Sherman Act by an assurance that the public be not overcharged as a result of private action by contract, combination, or conspiracy. Penn Water is engaged in an all out effort to avoid the FPC orders, retain the substantial amounts involved in the rate orders, and for the future secure a higher rate of return if, and to the extent, it can avoid FPC control. It is inconceivable that the Sherman Act can be perverted to accomplish a result so contrary to its original and continuing policy.

b. FPC HAS MADE IT EXPLICIT THAT IT HAS NOT ORDERED ANY ILLEGAL SERVICE ARRANGEMENT.

In the rate schedules which FPC prescribed in its Order of Oct. 27, 1949 (R. Vol. 17, pp. 5267, 5283), the final paragraph of the schedule for Penn Water reads:

> "The foregoing provisions supersede only the rates and charges heretofore made, demanded, collected or assessed against Baltimore Company by Penn Water

and Transmission Company. All other provisions of the aforementioned contracts, in and of themselves lawful prescribing or defining the power, energy and transmission services to be furnished, or any classification, practice, regulation or rule affecting such services, which several provisions are incorporated herein by reference, shall be observed and be in force."

Having been faced, in the petition for rehearing, with Penn Water's assertion that it was attacking its power contract in the courts because Articles IV and V violated the Sherman Act and other laws, FPC incorporated into its order only the "*service*" provisions of the contract (not as *contract* — but as part of the order) and then only such provisions as would be "in and of themselves lawful". This established clearly for Penn Water that the rates had been and were to remain fixed in relation to service and operations, and not in relation to Articles IV and V (legal or illegal) or any other provisions of the contract as such. FPC purposely omitted all that did not constitute a "classification, practice, regulation, or rule affecting such service."

Although we believe that a prescription of the entire Penn Water contract as a rate and service schedule would not have constituted an illegal order, subject to be annulled without inquiry as to the merits by the Fourth Circuit decisions, FPC ordered a schedule for service to Consolidated which does not embody as service arrangements any provisions of the contracts which might properly be deemed to be unlawful *per se*. In the argument below, Commission counsel adopted a construction of the schedule as eliminating Articles IV and V of the Penn Water contract, because the Fourth Circuit had found them, and only them, to be illegal *per se* (see footnote, *supra*).

Accordingly, whatever may be the merits as to petitioners' arguments that the Penn Water contract violates

the Sherman Act and related laws, because of the provisions of Article IV (controlling contracts with others) and Article V (controlling expansion), FPC takes the position that these Articles are not necessary to the rate schedules and are not prescribed thereby.

Apparently recognizing the weakness of basing their position on the only Articles which the Fourth Circuit found to be *illegal per se*, petitioners have now shifted their attack to an assertion of illegality in the method of payment, which they refer to as "illegal revenue pooling" (PUC brief, p. 29; P. W. brief, p. 21, and many repetitions in each brief). Petitioners apparently hope, by the force of repetition of these words, to establish an illegality in the form of payment which the Fourth Circuit refused to find in any of its Opinions, although it was most vigorously pressed upon the Court by Penn Water.

The form of payment provided for is obviously not "illegal revenue pooling". The benefits thereof were explained at length to FPC by the officers of *Penn Water* (R. Vol. 1, pp. 26, 70-71), and have been fully approved and ordered by FPC. In their inception they were modeled upon the Conowingo contract which had been approved by FPC, the Pennsylvania Commission, and the Maryland Commission.

If payment provisions of the rate orders in any way restrict Penn Water's incentive or initiative to render safe, adequate, and non-discriminatory service to the public, it is only by way of affording an exact method whereby from year to year Penn Water is permitted, and guaranteed, to earn an exact return — namely, the just and reasonable return as established by FPC from substantial evidence in the record. In this respect, the rate orders clearly accomplish the purpose and policy of both the Federal Power Act and the Sherman Act.

### C. The Fourth Circuit Opinions cannot be accepted as conclusive here of the Sherman Act determinations made by that Court.

#### *The Penn Water Contract Case*

Although certiorari has been denied by this Court in the *Penn Water Contract Case,* (184 F. 2d 552, cert. den. 340 U. S. 906 (1950)), the denial of certiorari does not amount to approval of the decision on its merits. *Agoston v. Commonwealth of Pennsylvania,* 340 U. S. 844 (1950).

Before this Court considers petitioners' arguments that the rate orders are invalid because they rest on illegal contracts, the Court must itself appraise the asserted grounds for illegality in the light of the record in the instant case. This record will show that many of the unfounded statements of Penn Water made in unaccepted proffers in the *Penn Water Contract Case,** and now repeated as fact in the briefs here, are contrary to fact and to the testimony of Penn Water's officers in this case (R. Vol. 1, pp. 14-28, 30-34, 68-78).** Their testimony herein shows that Penn Water in fact has no distribution territory in Maryland or Pennsylvania and has never sought to compete with its customers in Maryland or Pennsylvania, but has accepted its proper regulated business role as a generating utility selling at wholesale only;† that the 1931 contract was not entered into to "throttle" competition or to "stifle" Penn Water's incentive or initiative, but was a necessary arrange-

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* Which, being excluded in the trial court, were not subjected to cross-examination or met by rebuttal testimony.

** See footnote, p. 11.

† R. Vol. 1, p. 32, Mr. G. W. Spaulding, now President of Penn Water, testified:

> "It has never attempted to develop local distribution systems nor to enter upon a retail distribution business, nor has it attempted to compete with its other utility customers for bulk power industrial customers."

ment to enable Penn Water's unfirm hydro power from a river of widely fluctuating flow to be more effectively used in connection with the necessary large steam resources of Consolidated. The testimony in this record shows no dominating Consolidated,* but rather the true story of how Penn Water's officers claimed full credit for developing the hydro resources of the Susquehanna River, obtaining their greatest accomplishment in the 1931 contracts which achieved the "most economical result attainable" (R. Vol. 1, p. 26) "to the end of maximum utilization of natural resources, minimumization of investment and the utmost in service availability to the ultimate consumer" (R. Vol. 1, p. 69).

Now, petitioners urge this Court to strike down not only the contracts, but government orders based upon 21,200 pages of record and 602 exhibits, by merely looking at the face of the contracts, the Opinions of the Fourth Circuit (based upon a map and the face of the contracts), and the same map in the back of Penn Water's brief here.**

This, we respectfully say, cannot be the case. If it is to be given serious consideration at all, the Court should review the arguments presented by Consolidated and the Maryland Commission in their petitions for certiorari in the *Penn Water Contract Case* (October Term 1950, No. 424) as related to the facts now available in the instant record, and arrive at the correct conclusion that there is no "*per se*" violation of the Sherman Act involved.

On the contrary, the contract was a proper and lawful business means of developing and expanding the benefits

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* R. Vol. 1, p. 33, Mr. Spaulding testified:
"Penn Water is in the unique position of being the only *non-captive* wholesaling utility company in the United States."

** P. W. brief, p. 3 n. "**".

to be obtained from a valuable natural resource. Through it, Consolidated purchased and guaranteed the return upon the entire output of the Penn Water plant until 1980, subject to such existing contracts for sale to others as might be renewed or new contracts which might be made with Consolidated's consent (or required by law to be made) to others. Entire output contracts have never been illegal *per se*.

It is submitted that the Fourth Circuit misconstrued and misapplied this Court's decisions as to what constitutes a restraint of trade *per se*, in applying them in this area of government-regulated monopoly to such an arrangement. Of course, any concerted tampering with the *market price structure* cannot be justified. *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U. S. 392 (1927). But obviously concerted action, whereby the producer of energy and the purchaser thereof agree upon a price (even a complicated price) for the energy sold, is not *market price fixing*. If it were, every contract for purchase and sale would be *ipso facto* illegal.

Furthermore, the price of Penn Water's sales to Consolidated and to each of its Pennsylvania customers were subject to the complete supervision and control of FPC, which had been exercised before the Fourth Circuit acted. The decisions of this Court which we believe required application of the rule of reason to such a transaction were ignored by the Fourth Circuit. They should have applied to sustain both the Penn Water and Safe Harbor contracts, if they were at all subject to the Sherman Act.

*Standard Oil Co. v. U. S.*, 221 U. S. 1 (1911);
*Board of Trade of Chicago v. U. S.*, 246 U. S. 231 (1918);

*U. S. v. Bausch and Lomb Co.*, 321 U. S. 707, 728-9 (1944), (exclusive dealing arrangement);
*U. S. v. Yellow Cab Co.*, 332 U. S. 218 (1947), 338 U. S. 338 (1949), (vertical and horizontal integration);
*U. S. v. Columbia Steel Co.*, 334 U. S. 495 (1948), (horizontal integration);
*U. S. v. Paramount Pictures Corp.*, 334 U. S. 131, 173-4 (1948), (vertical integration by stock control and ancillary contracts);
*Standard Oil Co. of California v. U. S.*, 337 U. S. 293, 311-313 (1949).

*The Safe Harbor Contract*

The Fourth Circuit's decision in the *Safe Harbor Contract Case*, decided January 3, 1952, is pending certiorari before this Court in Nos. 611 and 612. There is no need to repeat here the reasons for granting certiorari that are fully stated in the petitions there. The Department of Justice (charged with the enforcement of the Sherman Act), representing FPC (charged with carrying out the policies of the Federal Power Act), has intervened and urges that certiorari be granted. We respectfully urge that the merits of the decision of the Fourth Circuit must be reviewed and independently judged by this Court before that decision be accepted, as urged by petitioners here, as forming any basis for questioning the rate orders here involved.*

It is with reference to the Safe Harbor power that petitioners urge that the rate orders rest for their allocation of the reduction upon "entitlements" under the Safe Harbor contract, and hence must fail (P. W. brief, p. 55; P. U. C. brief, p. 32). There are several answers to this argument.

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* The actual facts behind the 1931 contracts and the relations of Penn, Water, Safe Harbor, and Consolidated are set forth in the affidavits of Robert T. Greer and R. L. Thomas in the Record of Nos. 611 and 612 (R. 115 and 123).

First, the Fourth Circuit found nothing illegal in Consolidated's purchase until 1980 of two-thirds of the entire Safe Harbor output. Petitioners can point to no place where the Fourth Circuit, or any other Court, has so held.

Secondly, although Penn Water sought in every way throughout the FPC hearings (except by attacking the legality of the contract) to prevent an allocation to Consolidated of its clearly equitable right to two-thirds of the entire output of Safe Harbor, FPC and the Court below found that the record presents nothing to support Penn Water's contentions. The Court below said:

> "The materials before the Commission were hardly consistent with the interpretation now sought by Penn Water. They pointed instead to the view, adopted by the Commission, that Baltimore Company (Consolidated) had a two-thirds entitlement from Safe Harbor which was diverted by Penn Water in order to satisfy its Pennsylvania commitments" (R. Vol. 18, p. 5391).

Thirdly, whatever may be the status of the Safe Harbor contract, the FPC Order in the *Safe Harbor rate case* (5 F. P. C. Rep. 221), affirmed by the Third Circuit (179 F. 2d 179, cert. den. 339 U. S. 957 (1950)), has required Consolidated to pay for two-thirds of the Safe Harbor output and to continue doing so until changed under the law. An allocation can hardly be held arbitrary or unlawful for crediting Consolidated with what it is obligated by law to buy.

The Safe Harbor contract decision by the Fourth Circuit, without inquiry into its merits, cannot be interpreted as supporting petitioners' arguments to strike down the allocation involved in the rate orders under appeal, because of artificial contractual entitlements.

**4. The Rate Orders Should Not be Annulled or Remanded Because of the Pennsylvania Public Utility Law or Public Policy.**

Earlier arguments, without further elaboration, establish here also that the rate orders, as orders prescribed by the Federal Government through FPC acting under authority conferred by the Federal Power Act, are removed from condemnation by statutes or common law policy which might apply to private contracts.

Also, to the extent that the rate orders omit Articles IV and V of the Penn Water contract from the prescribed rate schedules, they do not even conflict with the decision of the *Fourth Circuit* upon which Penn Water relies. The Fourth Circuit (184 F. 2d 552, 566), related that portion of its Opinion dealing with Pennsylvania law and policy solely to Articles IV and V,* saying:

> "There can be no doubt that the freedom of action of Penn Water as a public utility of the State has been and is restricted by the provisions of Articles IV and V of the basic agreement * * *."

However, the Fourth Circuit decisions, assuming *arguendo* that they may be related to the rate orders, were in clear error in applying to licensee-public utilities (Penn Water and Safe Harbor) the provisions of the Pennsylvania public utility law referred to by the Fourth Circuit, 184 F. 2d 552, 566 (1950). When it is considered that *every provision* of Penn Water's contracts constituted a term of an interstate sale of electric energy at wholesale within the meaning of the Federal Power Act, filed as a tariff with FPC and completely subject to the jurisdiction of FPC

* As did its entire reasoning concerning invalidity under the Sherman Act and other federal statutes.

under the Federal Power Act, there could be no proper application of Pennsylvania law thereto.

As the commerce clause of the Constitution removes the interstate sale of electricity at wholesale from the regulatory power of the States, even in the absence of Congressional control, *P. U. C. v. Attleboro Steam and Electric Co.*, 273 U. S. 83 (1927), there is clearly no jurisdiction in the States once the national control has been expressed under the comprehensive provisions of the Federal Power Act, and has been exercised by FPC acting thereunder. The sections of the Pennsylvania Public Utility Law cited in the Pennsylvania Commission's brief (pp. 45-49), only some of which were relied on by the Fourth Circuit (184 F. 2d 552, 566), are the normal provisions relating to adequacy of service, abandonment or termination of service, the maintenance of just and reasonable service, and the power to sell, assign, lease, consolidate, or merge its property, powers, franchises or privileges, etc. There are corresponding provisions of the Federal Power Act (Secs. 8, 20, 202, 203a, 205, 206, and 207) which completely remove from the application of Pennsylvania law the entirely interstate business of Penn Water and Safe Harbor. These companies have no intrastate sales subject to the jurisdiction of the Pennsylvania Commission or the Pennsylvania public utility law.

The Fourth Circuit (184 F. 2d 552, 568), in partial justification of its decision in the *Penn Water Contract Case*, said:

> "The evidence in this case shows that Penn Water is engaged in the *production and local distribution* of electrical energy to local utilities which distribute power to consumers in Pennsylvania, and in respect to this business, it seems clear that the state commission possesses regulatory power".

Earlier in its Opinion, the Fourth Circuit (184 F. 2d 552, 555) had correctly stated that "Penn Water sells its electric

energy and services in bulk to five customers". It continued with a correct description of the sales to Consolidated, ME, PP&L, and PE* (which are all interstate sales at wholesale, subject in their entirety to FPC jurisdiction, as found by FPC in the instant case upon substantial evidence in the record and confirmed by the Court below, R. Vol. 18, pp. 5382-5384) and to the Pennsylvania Railroad which is likewise an interstate sale in bulk.** Penn Water simply does not have any "local business" or "local activities" such as the Fourth Circuit stated, and there is no explanation or justification for the portion of its Opinion (184 F. 2d 568) which flatly contradicts the correct statement at the beginning of the Opinion (184 F. 2d 555). Obviously, whatever the Fourth Circuit said (and we have earlier indicated the complete lack of a factual record there), this Court must be governed by the instant record, and the FPC findings fully supported by evidence, that Penn Water has no intrastate business (R. Vol. 18, pp. 5382-5384).

The Fourth Circuit's decision to apply State utility law to Safe Harbor's operations was even more flagrant. There is no intrastate service for State utility law to control. FPC's *Safe Harbor rate case* Opinion (5 FPC Rep. 221 (1946)), asserting control over *all* of Safe Harbor's sales, had been affirmed by the Court of Appeals for the Third Circuit, 179 F. 2d 179 (1949), and certiorari had been denied by this Court, 339 U. S. 957 (1950). Beyond that, and resting thereon, a special statutory three-judge court for the Middle District of Pennsylvania has enjoined the

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* Metropolitan Edison Company, Pennsylvania Power and Light Company, and Philadelphia Electric Company.

** FPC did not assert control over the sales to the Pennsylvania Railroad, but obviously that does not make it local business subject to State control. It is a sale in interstate commerce, out of the same interstate power pool as found by FPC, but was exempted from the instant Orders because it is not a sale at wholesale for resale.

Pennsylvania Commission from exercising rate control over Safe Harbor, finding that Safe Harbor makes no intrastate sales.* This aspect of the *Safe Harbor Contract Case* clearly disregards controlling federal law and the commerce clause of the Constitution, and calls for review and reversal by this Court.

## CONCLUSION

We believe that we have fully supported the preliminary statement with which we began this brief, and which summarizes our position at its conclusion.

It is respectfully submitted that the judgments and orders of the Court of Appeals for the District of Columbia Circuit should be affirmed in all respects.

Respectfully submitted,

CHARLES D. HARRIS,
General Counsel,
Public Service Commission
of Maryland,
Intervenor-Respondent.

Baltimore, Maryland
March 27, 1952.

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* *Consolidated Gas Electric Light and Power Company of Baltimore v. Siggins, et al.*, 99 F. Supp. 151 (1951).